No. 13,745

IN THE

United States Court of Appeals

For the Ninth Circuit

FONG WONE JING, FONG HUNG WING and FONG NGAR JING, by their Guardian Ad Litem, William Y. Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPELLANTS' REPLY BRIEF.

JACKSON & HERTOGS,
JOSEPH S. HERTOGS,
580 Washington Street, San Francisco 11, California,
ARTHUR J. PHELAN,
1306 Mills Tower, San Francisco 4, California,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes Pages

Texts

Miscellaneous

No. 13,745

IN THE

United States Court of Appeals

For the Ninth Circuit

FONG WONE JING, FONG HUNG WING and FONG NGAR JING, by their Guardian Ad Litem, William Y. Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPELLANTS' REPLY BRIEF.

The greater part of appellee's brief is devoted to contending that the trial Court did not have jurisdiction of the case, a contention, incidentally, which appellee did not make in the Court below.

In his argument relative to jurisdiction appellee discusses many matters which do not actually involve the jurisdiction of the Court, and which in the interest of clarity should be disposed of before proceeding to a consideration of his main contentions. We shall therefore deviate somewhat from the order fol-

lowed in appellee's brief, but we think this deviation is necessary to eliminate confusion both as to the facts and as to the legal propositions involved.

---

1. THE DISTRICT COURT HAD JURISDICTION OF THE CASE.

(a) **Appellants have been denied a right and privilege as nationals of the United States.**

In his statement of the case appellee asserts that appellants did not prove the allegations of the complaint that the Consulate General at Hong Kong had denied them passports or travel documents to enable them to proceed to the United States. The allegations of the complaint in this respect are as follows:

"VI.

That on or about January 24, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of plaintiff, Fong Hung Wing; that on or about May 10, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of plaintiffs, Fong Wone Jing and Fong Ngar Jing; *that the applicants and each of them were informed by the American Consulate General at Hong Kong on or about January 24, 1952, that their applications for documentation had been denied, and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of traveling to the United States';* and that the

plaintiffs, Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, claim that the refusal of the American Consulate General at Hong Kong to permit the said Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing to proceed to a port of entry in the United States for the purpose of having their admissibility determined by the administrative agency charged with such duty is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national;" (T 5-6).

The denial of such documents to appellants by the Consulate General was at no time disputed in the Court below, but was tacitly admitted in the opening statement (T. 20-21) and throughout the trial. Moreover, the averment in paragraph VI of the answer that "defendant has no knowledge, information or belief as to the allegations contained in paragraph VI of the complaint and therefore denies the same," is entirely insufficient, under numerous authorities, to put in issue the facts positively alleged in the complaint regarding the denial of their applications by the Consul General.

It is well settled that a denial on the ground of lack of knowledge, information and belief, of a fact which is a matter of public record, or is within the knowledge of the defendant or accessible to him by consulting his records, is insufficient and frivolous.

Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp. (C.A. 9) 166 F.(2d) 997, 1001; cert. den. 334 U. S. 837, 68 S. Ct. 1494, 92 L. Ed. 1762;

Lloyd Sabaudo Societa Anonime Per Azioni v. Elting (D. C., S.D., N. Y.) 46 F.(2d) 315;
Nieman v. Bethlehem Nat. Bank (D. C., E. D., Pa.) 32 F. S. 436;
Christmas v. City of Asbury Park (D. C., N. J.) 10 F. S. 22, 25;
Reed v. Turner (D. C., E. D., Pa.) 2 F. R. D. 12.

See also:

71 C. J. S. 259;
Peacock v. United States (C.A. 9) 125 F. 583, 586-587.

Obviously the appellee, Secretary of State, may not disclaim knowledge or information as to whether his own subordinate, the Consul General at Hong Kong, had denied appellants' application for travel documents as specifically alleged in the complaint. That information was readily obtainable from the Consulate General. While appellee's counsel stated at the trial that "the entire State Department file has been lost" it appears from his statement that it was lost in Washington about three months before the trial began (T. 20), or about five months *after* the answer was filed. Therefore, there *was* a State Department record covering the case, and it was not simply a matter, as appellee suggests, of three unknown Chinese children appearing at the Consulate General and being told "I don't know who you are" (Appellee's Brief p. 37).

In the *Lloyd Sabaudo* case, supra, the defendant Collector of Customs denied knowledge or information

sufficient to form a belief as to certain official action alleged to have been taken in the case by the immigration authorities. The Court said:

> "The defendant, having acted as an officer of the Government in the collection of the fines, was entitled to have access to the records which disclosed the facts upon which the fines were based, and as a matter of law must be presumed to have had knowledge of these facts (citing cases)."

The Court went on to quote from *Dahlstrom v. Gemunder,* 198 N. Y. 449, 92 N. E. 106, 19 Ann. Cas. 771, as follows:

> "A party may not thus deny the possession of knowledge or information which presumably he has; *neither may he purposely turn his head and close his eyes and ears for the purpose of avoiding knowledge and information, and of enabling him to make a denial thereof."* (Italics added.)

Obviously, therefore, the specific allegations in the complaint that these appellants filed applications for passports or travel documents with the Consulate General on or about January 24, 1951 and May 10, 1951, respectively, and that the Consulate General informed them on or about January 24, 1952 that their applications had been denied, were not traversed by any proper pleading, and certainly were not in any manner disputed nor put in issue at any time in the proceedings in the trial Court.

The facts so pleaded were clearly sufficient to invoke the jurisdiction of the District Court. As this Court stated in *Westminster School District of Orange*

County et al. v. Mendez et al., 161 F.(2d) 774, 778, which involved alleged denial of rights or privileges guaranteed by the Constitution and Federal Laws:

> "It is said in *Bell v. Hood,* 327 U. S. 678, 682, 66 S. Ct. 773, 776 that '* * * the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy'. Therefore, the District Court was right in taking jurisdiction".

In

The Fair v. Kohler Die and Specialty Co., 228 U. S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716,

Mr. Justice Holmes said:

> "Conversely, when the plaintiff bases his cause of action upon an Act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim * * * But if the plaintiff really makes a substantial claim under an Act of Congress, there is jurisdiction whether the claim ultimately be held good or bad".

In that case Justice Holmes went on to say that the appellant's plea "though purporting to go to the jurisdiction of the court" merely amounted to a contention that the basis for a recovery did not exist, and held that the trial Court properly took jurisdiction of the case.

As stated by the Supreme Court in

Binderup v. Pathe Exchange, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308:

> "A complaint setting forth a substantial claim under a Federal statute presents a case within the

> jurisdiction of the court as a Federal Court, and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous, or, in other words, is plainly without color of merit (citing cases)."

In the case at bar, the claim set forth in the complaint was obviously a substantial one, and this was clearly sufficient to invoke the jurisdiction of the Court below. The situation is entirely different from that which was presented in the case of *Clark v. Inouye,* 175 F.(2d) 740, wherein the complaint alleged no facts, but only a conclusion of law, with respect to any asserted denial of any right or privilege. In the case at bar the denial of the specific right and privilege was factually pleaded, and the facts so pleaded were not even traversed except by a *pro forma* denial for asserted lack of knowledge or information which was obviously insufficient to put the matter in issue, as we have heretofore demonstrated. Nor did appellee at any time in the course of the trial in any matter dispute or deny the consular rejection of appellants' claim.

Appellee's present contention puts him somewhat in the same position as was the appellant-defendant in

Louisville & N. R. Co. v. Botts (C.A. 8) 173 F.(2d) 164, 168-169.

In that case it was held that where the defendant had not asserted that it was not engaged in interstate commerce, either in its opening statement, its evidence or its closing argument, an attempt to raise that point by way of an exception to the instructions came too late. In that case interstate commerce was the basis of the right of recovery under the statute, and yet it was held that the defendant could not raise the point after ignoring it throughout the trial. Certainly appellee is in no better position in this case to contend for the first time on appeal that there was no denial of any right or privilege of appellants by the Consulate General. Moreover, there was no denial of the allegations of the complaint in that regard sufficient to put the matter in issue, since appellee, under the authorities we have cited above and many others to the same effect, could not plead lack of information as to official action taken by his own subordinate, i.e., could not "purposely turn his head and close his eyes and ears for the purpose of avoiding knowledge and information and of enabling him to make a denial thereof" (*Dahlstrom v. Gemunder,* supra).

We might add that had there been no denial of travel documents by the Consul General he certainly would not have issued the certificate of identity which is prescribed by section 903 for issuance to persons who have filed a suit thereunder and who make a showing under oath to the consular officer that the claim presented in such action is made in good faith

and has a substantial basis. Issuance of such a certificate is a recognition that there was substantial basis for the suit which had been instituted, and obviously the Consul General would not have issued the certificate unless his records showed that the alleged denial by him, which was the basis of the suit, had actually occurred.

Appellee also contends that denial of a passport does not constitute denial of a right or privilege because issuance of a passport is discretionary. This contention is obviously baseless in view of the requirement of Presidential Proclamation No. 2523 (55 Stat. 1696) that any citizen attempting to enter the United States must have a passport unless within exceptions prescribed by the Secretary of State. Without a travel document issued by the Consulate General no carrier in the Orient will transport any citizen or alleged citizen to the United States, for fear of penal proceedings under 22 U. S. C. sec. 225. Consequently, a refusal to issue a passport, or to except the applicant from the requirement, now effectively prevents the applicant from proceeding to the United States, and we fail to see how it can be contended that such a deprivation is not the denial of a right or privilege of a national of the United States within the meaning of section 903 under which this action was brought. That section has repeatedly been applied to cases involving denial of a passport (Cf. *Acheson v. Yee King Gee* (C.A. 9) 184 F.(2d) 382; *Schioles v. Secretary of State* (C.A. 7) 175 F.(2d) 402).

This Court previously expressed its opinion in the case of *Wong Wing Foo v. McGrath,* 196 F.(2d) 120, at page 122:

> "Nothing in the above text suggests that the 'action * * * for a judgment declaring him to be a national' is to succeed some prior administrative proceeding. This action is largely invoked where there has been no administrative proceeding at all. Such is the case where the Department of State refused to give a passport. Perkins v. Elg, 307 U.S. 325; Podea v. Acheson, 179 F.(2d) 306 (Cir. 2); or where a consul refuses to register a person as a United States national, Acheson v. Mariko Kuniyuki, 189 F.(2d) 741 (Cir. 9); or refuses to allow a person claiming American citizenship to come to this county, Acheson v. Yee King Gee, 184 F.(2d) 382 (Cir. 9); or where American citizens acting under claimed duress have filed with the Attorney General notices of their renunciation of citizenship and then later seek to have them set aside. McGrath v. Tadayasu Abo, 186 F.(2d) 766 (Cir. 9)."

At this point we shall dispose of a related contention made in appellee's brief which appears to us to border upon the frivolous, viz.: that "the granting of the certificate of identity removed the denial and permitted the appellant to come to the United States, and his claim should have been processed through the Immigration Service" (Appellee's Brief p. 38).

The utter absurdity of this proposition is demonstrated by reading the statute and the regulation.

The sole purpose and effect of such a certificate are that the plaintiff "may be admitted to the United States with such certificate *upon the condition that he shall be subject to deportation in case it shall be decided by the Court that he is not a national of the United States*" (italics added) (8 U. S. C. sec. 903, supra). Need we say more? Does appellee mean to contend that where a Consul denies a citizen a right, and the citizen sues, and the Consul issues a certificate of identity which permits the plaintiff to enter the United States *for the sole purpose* of obtaining a decision in the suit, that the suit collapses with the issuance of such a certificate? Such a proposition is palpably absurd.

Equally baseless is the suggestion that appellants' claim "should have been processed through the Immigration Service". That is just what the Consular authorities by their actions have prevented. Appellants originally applied to the Consulate for travel documents to permit them to proceed to a port of entry for that very purpose. That application was denied. They were forced to file suit, since they could not legally proceed to the United States without a passport unless waived by the State Department (22 U. S. C. secs. 223-226; Proclamation No. 2523, 55 Stat. 1696). The Consul then issued them the certificate of identity prescribed by sec. 903, supra, which permitted them to come to the United States *solely* to await the Court's decision in the suit. The immigration regulations (8 C. F. R. sec. 112.2, 1947 Ed.) spe-

cifically precluded the immigration authorities from determining the citizenship claims of holders of such certificates of identity, in the following language:

> "The holder of such a certificate of identity *shall be regarded as an alien until otherwise finally held by the court* in the action for a judgment declaring him to be a national of the United States. *He shall be admitted to the United States as a temporary visitor* for business *on the condition,* including when deemed necessary, the giving of a bond with sufficient surety, *that he shall depart from the United States* if it is discovered that he has obtained admission by fraud or other illegality or *if the final action in court to determine his nationality is not to the effect that he is a national of the United States.* * * *" (Italics added).

Obviously, therefore, the issuance of the certificate of identity did not remove the denial of appellants' rights and privileges, since it merely permitted them to come to the United States as aliens *solely* for the purpose of litigating the suit, and did not permit them to submit their citizenship claim to the immigration tribunals for determination, but by express provision of the statute required their deportation if the suit was decided adversely to them. As a matter of fact, the sole purpose of their application to the Consulate for travel documents in the first place was so that they might proceed to a port of entry and submit their claim to the immigration tribunals, and that is just what the Consul prevented them from doing.

Appellee's brief further suggests that appellants were among an indeterminate number of applicants who "literally deluged" the Consulate, that the Consul said: "I don't know who you are" and declined to grant the documentation, and that a complaint was filed "forthwith" in the District Court. Apparently the implication here also is that there had been no denial of any right or privilege by the Consulate.

As pointed out above, the complaint specifically alleged that these appellants applied at the Consulate *on or about January 24, 1951 and May 10, 1951* respectively, and that they "were informed by the American Consulate General at Hong Kong *on or about January 24, 1952 that their applications for documentation had been denied,* and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of travelling to the United States' " (T. 5-6). There was no effective denial of these positive averments. Parenthetically it might be observed that an applicant would be just as effectively stopped by an obdurate "I don't know who you are" as by any other verbal formula. If he could be deprived of his statutory recourse under section 903, supra, by consular refusal to act upon his case (as the foregoing suggestion would seem to imply), then indeed even the proverbial "Chinaman's chance" mentioned by this Court in *Yuen Boo Ming v. United States,* 103 F.(2d) 355, 358, would have been taken away. Here, however, the specific denial by the Consulate is alleged, and is uncontradicted.

For the foregoing reasons it is clear that appellants were denied "a right or privilege as a national of the United States" within the meaning of section 903, supra, viz., the right to proceed to the United States. We turn now to the question whether that section applies only to expatriation cases and to individuals who have previously resided in the United States.

(b) The statutory remedy (8 U.S.C. sec. 903) is not limited to persons who have previously been in the United States or to expatriation cases.

The words of the statute are broad and clear. There is no ambiguity. The statute says that *"any person"* who is denied a right *or privilege* as a national "by *any* Department or Agency, or executive official thereof" upon the ground that he is not a national, may bring the action for a declaration that he is a national. This expression is in the broadest possible terms (see *Johnson v. Southern Pac. Co.*, 25 S. Ct. 158, 196 U.S. 1, 49 L.Ed. 363, 369; 48 *C.J.* 1041).

There is no indication in this sweeping language that the remedy is available only where a question of expatriation is involved. Neither is there indication that foreign-born citizens were excepted if they had not theretofore been in the United States. The statute states that *"any person"* who claims a right or privilege as a national, and who is denied such right or privilege, "regardless of whether he is within the United States or abroad" may institute the action.

Obviously this Court cannot read into this all-embracing language limitations which are not there. This Court has heretofore construed this language to mean that the priceless right of citizenship was not to be denied one possessing it by an administrative proceeding (*Wong Wing Foo v. McGrath,* 196 F.(2d) 120, 122).

Appellee quotes from the Congressional debates upon the bill which became the Nationality Act of 1940. But debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.

> *U. S. v. Trans-Missouri Freight Assoc.,* 166 U. S. 290, 318, 17 S. Ct. 540, 41 L. Ed. 1007, 1020.

Reports of committees may be considered "where otherwise the meaning of a statute is obscure".

> *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, 474, 41 S. Ct. 172, 65 L. Ed. 349, 360.

> "But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a committee—can be resorted to for the purpose of construing a statute contrary to its plain terms * * *."
>
> *Penn. R. Co. v. International Coal Mining Co.,* 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446.

> "The debate between two congressmen on the floor of the house * * * concerning the meaning

of Section 503 thereof, is not the measure of the content of the Section * * *"

Gan Seow Tung v. Carusi (D. C., S. D., Cal.) 83 F. S. 480, 481.

Finally, we find nothing in the material quoted by appellee which supports his position. In

Look Yun Lin v. Acheson, 87 F. S. 463, 465,

Judge Erskine carefully considered the identical contention now under discussion, and pointed out that neither the language of the statute, the decided cases nor the Congressional debates support the contention that section 903, supra, applies only to cases involving expatriation or former residence in the United States.

Appellee argues that when the Nationality Act was enacted it was not mandatory for a citizen seeking to come to the United States to apply to a consular officer for a passport, and hence that Congress in enacting section 903, supra, could not have had in mind cases involving denial of a passport. But even if citizens were not required to have passports in order to travel at that time, certainly it was a "privilege" of a citizen to obtain one, even if only for purposes of protection. Consequently cases involving denial of a passport are clearly within the explicit language of section 903, and that section has heretofore been applied by the Courts to cases involving denials of passports (e.g., *Acheson v. Yee King Gee*, supra; *Schioles v. Secretary of State*, supra).

The immigration cases cited at pages 18-30 of appellee's brief simply establishes the principle that there

is a *constitutional* right to a judicial hearing where the Government seeks to expel a person who claims to be a citizen (*Ng Fung Ho v. White,* 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938) whereas there is no *constitutional* right to a judicial hearing in the case of one stopped at the border seeking entry, at least if he has never been within the United States (*Quon Quon Poy v. Johnson,* 273 U. S. 352, 47 S. Ct. 346, 71 L. Ed. 680). In the case at bar the proceeding is not one on *habeas corpus* to claim a *constitutional* right to a judicial hearing of a citizenship claim but is a suit brought under *an Act of Congress* which expressly authorizes such a suit to be instituted by *any person* who has been denied a *right or privilege* as a national on the ground that he is not a national of the United States. When Congress enacted section 903, Congress did not confine the statutory remedy thus created to cases of those who were within the United States, nor even to those who had previously resided therein. The only mention of residence in the statute has to do with venue (*Acheson v. Yee King Gee* (C.A. 9) 184 F.(2d) 382). The suitor may bring his action in the District of Columbia, or if he *claims* a permanent residence in any judicial district of the United States he may bring it in the District Court for such district. But *"any person"* may bring the action if he has been denied a right or privilege as a national.

We do not agree with appellee's suggestion that in the *Yee King Gee* case, supra, the question of jurisdiction was not squarely presented. That case involved a Chinese person who had never been in the United

States and who was claiming a residence in Seattle, Washington, because his father lived there. Jurisdiction of the District Court to entertain the suit was challenged, and while the Court did point out that the matter of residence was simply one of venue under this statute, the decision necessarily negatives the contention that a person without previous residence in the United States cannot sue at all under the statute. Moreover, the decision of this Court in the *Wong Wing Foo* case, supra, also clearly negatives the construction of the statute now contended for by appellee.

As stated by Judge Erskine in

Look Yun Lin v. Acheson, supra,

> "However, the statute permits suit to be brought in the district where the plaintiff 'claims' a permanent residence. Actual residence at present or at any time in the past is not required."

Appellee has not cited a single case which holds that section 903 is limited to cases involving expatriation or former residence, and he has cited many which hold otherwise but contends that they all should be overruled.

Both *Medeiros v. Watkins* (C.A. 2), 166 F.(2d) 897, and *Carmichael v. Delaney* (C.A. 9), 170 F.(2d) 239, relied upon by appellee, were *habeas corpus* proceedings and not suits under section 903, supra. The question involved in those cases was whether a person asserting citizenship could *constitutionally* be excluded (or deported) without a judicial trial of the issue

of citizenship. The Court of Appeals for the Second Circuit clearly pointed out the distinction in

U. S. ex rel. Chu Leung v. Shaughnessy, 176 F.(2d) 249,

and although holding that no constitutional bar existed to the relator's exclusion by administrative process, pointed out that he could seek a judicial declaration of his citizenship under section 903 of the Nationality Act of 1940, supra. The same distinction was pointed out and the same result reached by District Judge Holtzoff in

Mah Ying Og v. Clark, 81 F. S. 696.

In that case the Court said regarding section 903, supra:

> "Its purpose was to accord a judicial remedy to a person who claims to be a citizen of the United States if this status is denied by an administrative official or administrative body. Citizenship of the United States is a very precious thing and no one's right to this status should be finally adjudicated or determined except by the Courts in a judicial proceeding. This certainly was the view of the Congress in enacting the foregoing provision of the statute."

These views were expressly approved by the Court of Appeals for the District of Columbia in deciding an appeal from a subsequent order in the same case.

Mah Ying Og v. McGrath, 187 F.(2d) 199.

In that case the Court of Appeals held that the appellant, who was born in China of an alleged American citizen parent, was entitled to have his

citizenship judicially determined under section 903, supra, notwithstanding the fact that he had been excluded by the immigration authorities and that a petition for writ of *habeas corpus* had previously been denied.[1]

See also,

Gan Seow Tung v. Clark (D. C., S. D., Cal., 83 F. S. 482.

To conclude the discussion as to this branch of the argument, the Courts have uniformly rejected the proposition that section 903, supra, applies only to cases involving expatriation or previous residence in the United States. Moreover, the language of the section itself precludes such an interpretation. The effort to support the proposition by resort to the Congressional debate is likewise ineffectual.

(c) Conclusion as to jurisdiction of the trial Court.

We respectfully submit on the question of jurisdiction that:

1. The trial Court had jurisdiction over the subject matter under section 903, supra;

2. The allegations of the complaint respecting the consular refusal to grant travel documents to appellants were sufficient to invoke the jurisdiction of the Court under that section and those allegations were not effectually traversed nor put in issue in any manner in the Court below;

---

[1]It is clear from the various opinions that the appellant there had not previously resided in the United States.

3. Appellants' claim of residence in the Northern District of California was sufficient to invoke the jurisdiction of the trial Court and establish venue (*Acheson v. Yee King Gee,* supra);

4. The granting of the certificate of identity which permitted appellants to come to the United States solely to prosecute the action did not remove the denial of their rights which formed the basis of the suit.

---

2. THE FINDINGS OF FACT ARE CLEARLY ERRONEOUS.

Appellee repeatedly states in his brief that appellants are persons about whom nothing is known. The point of this repeated assertion escapes us, but we desire to point out a few undeniable facts. *First:* Appellants claim to be the children of Fong Lim Fong. *Second:* Fong Lim Fong was admittedly a citizen of the United States. *Third:* Appellants' older brother, Fong Hung Fong (Fong Din Deck) is concededly the son of Fong Lim Fong, having been admitted as such in 1949. *Fourth:* Yee Song Mee is admittedly the mother of Fong Lim Fong. *Fifth:* Ruby Fong Lee is admittedly the sister of Fong Lim Fong. *Sixth:* William Y. Fong is admittedly the brother of Fong Lim Fong. *Seventh:* These four admitted relatives of Fong Lim Fong appeared and testified in the Court below. *Eighth:* Appellee was offered the opportunity in the Court below of putting into evidence "any of the Immigration records or anything else that they

have" (T. 83) and did not avail himself of that opportunity; consequently it may be assumed that the immigration records are consistent with the family background as related by these witnesses, for otherwise appellee would have been quick to introduce such records in evidence when invited to do so by appellants. *Ninth:* It is undisputed that the photograph (Plaintiffs' Ex. 3) was taken by the aunt in the home village of Fong Lim Fong's family in 1936 and that the persons shown in the photograph are the grandmother, the previously admitted child (Fong Hung Fong) and the appellant Fong Hung Wing.

It is therefore clear that much is known about the family to which appellants claim to belong and about the four relatives who testified as witnesses in support of their claim. It is, of course, unfortunate that the Consular file covering the application of appellants for travel documents has become lost, since if available it would doubtless show the appearance of Jee Shee, appellants' mother, at the Consulate with them. However, the loss of the file is not the fault of appellants and the repeated protestations that appellee knows nothing of appellants seem somewhat hollow. The same might be said of any person who seeks to establish relationship to another. If a denial of recognition as a citizen could be based upon the mere fact that the claimant was unknown to the official receiving the application, few citizens could hope to be recognized as such by such officials. We wonder if there is not a disposition on the part of appellee to "purposely turn his head and close his eyes and

ears for the purpose of avoiding knowledge and information" (*Dahlstrom v. Gemunder,* supra).

Executive efforts to fashion a different gauge for measuring the citizenship rights of Chinese persons from that applied to persons of other races have been lengthy and persistent. At one time it was even contended that a person born in the United States of Chinese parentage was not a citizen, and it took a decision of the Supreme Court to dispose of that one (*United States v. Wong Kim Ark,* 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890). It was then attempted by administrative regulation to exclude Chinese children from the benefits of Section 1993 of the Revised Statutes. That move was halted by this Court.

Quan Hing Sun v. White (C.A. 9) 254 F. 402, 405.

See also:

30 Opn. A. G. 529.

There was also an unsuccessful attempt to exclude Chinese children of citizens if they did not come to the United States before attaining the age of 21, although no such requirement was then contained in the statute.

Ex parte Tom Toy Tin (D. C., N.D., Cal.) 230 F. 747;

Ex parte Ng Doo Wong (D. C., N. D., Cal.) 230 F. 751.

Finally there was an attempt to hold that a Chinese person seeking admission as a citizen was not entitled to a hearing before a Board of Special Inquiry, although that right was accorded all other applicants for

admission either as aliens or citizens. This Court, of course, struck down that attempt.

Quan Hing Sun v. White, supra;

Jeong Quey How v. White, 258 F. 618, cert. den. 251 U. S. 559, 40 S. Ct. 180, 64 L. Ed. 414.

The continued executive hostility to the policy of the statute so far as it applied to Chinese children was noticed by the late Judge Dooling as early as 1916, as follows:

> "I conceive it to be the duty of executive as well as of judicial officers fairly and freely to administer the laws of Congress as they find them, whether they agree with the policy or purpose of such laws or not. In the instant case the very law which would entitle the applicant to admission into this country is regarded with such hostility as to be cast into the balance against him. If applicant is the son of a resident American citizen, he, too, is a citizen, and entitled to every right as such. The question of relationship should therefore be fairly investigated with a view to ascertain the truth, and with a perfect willingness to admit him as a citizen under this law instead of being investigated in a spirit hostile to the law which, lacking the power to repeal, accomplishes the same result by denying to it effect."
>
> *Ex parte Lee Dung Moo* (D. C., N. D., Cal.) 230 F. 746, 747.

Appellee's continued protestation that these are unknown children (who with an indeterminate number of other unknowns "deluged" the consulate as ap-

plicants for travel documents) seems to reflect some of this executive impatience with the policy of the statutes conferring citizenship upon children born in China of American-citizen parents. In any event it fails to justify rejection of the positive, uncontradicted and unimpeached evidence presented in this case.

In his discussion of the findings of the Court below, appellee cites a number of early decisions wherein certain evidence offered by the claimant was held to be insufficient to establish citizenship. Those cases are not in point. In none of those cases did six members of a family give direct, positive, uncontradicted and unimpeached testimony on an issue of relationship. Moreover, any attempt to deduce from those cases the theory that testimony of Chinese witnesses *per se* is afflicted with a basic infirmity must fail. While there have been early cases in the lower Courts in which such a view was either expressed or implied, that doctrine has long since been flatly rejected by this Court (*Yee Chung v. United States,* 243 F. 126, 130; *Lau Hu Yuen v. United States,* 85 F.(2d) 327, 330).

Appellee also cites *U. S. v. Manzi,* 276 U. S. 463, to the effect that when doubts exist concerning a grant of citizenship they should be resolved against the claimant. But that was a *naturalization* proceeding, wherein the individual was petitioning for the *grant* of citizenship as a matter of grace. In the case at bar if these appellants are the children of Fong Lim Fong they were citizens of the United States at birth. Here

the suit is simply one to determine that fact. We submit that such an issue when it arises in an action under Section 903, supra, is determinable under the principles and standards applicable generally to the trial of such issues in civil causes in the Federal Courts. We have demonstrated in our opening brief that under those principles and standards a finding cannot rest upon mere speculation, conjecture, surmise, guess or suspicion, and that positive, uncontradicted and unimpeached testimony cannot be disregarded.

Appellee stresses the line of Supreme Court cases which established the proposition that Congress may constitutionally commit the determination of citizenship claims to executive officers where the applicant is seeking admission, at least if he has never been in the United States. We have already pointed out that these appellants have not relied upon any supposed constitutional right to a judicial determination of their claim, but are in Court under *a statute* which *expressly* gives the right to sue to *any person* who claims a right or privilege as a national and who has been denied such right or privilege by the executive officers (8 U. S. C. sec. 903, supra).

With regard to the decisions of this Court in *Go Lun v. Nagle,* 22 F.(2d) 246, *Gung You v. Nagle,* 34 F.(2d) 848, *Quan Toon Jung v. Bonham,* 119 F.(2d) 915 and *Wong Tsick Wye et al. v. Nagle,* 33 F.(2d) 226, which we cited in our opening brief to demonstrate that a finding against the appellants on the evidence here presented would not withstand appellate

review even if made by an administrative tribunal whose decisions possess statutory finality, appellee contents himself with replying that in those cases this Court was in error. It is undoubtedly superfluous for us to remark that disregard of unimpeached and uncontradicted testimony, such as is presented here, has always been held to constitute abuse of discretion on the part of an administrative tribunal and to render the decision subject to being set aside on *habeas corpus.*

Appellee states that some of the other cases cited in our opening brief involved deportation of persons claiming to be native-born citizens. That is a distinction without a difference. Those particular cases clearly establish the proposition that even in judicial deportation proceedings uncontradicted and unimpeached testimony cannot be disregarded by the trial Court, that the evidence may not be rejected because the witnesses are Chinese, that the evidence must be weighed in the light of the party's ability to produce evidence and that the requirement as to proof is that it satisfy "reasonable judicial standards". Measured by those settled principles, we submit that the judgment in the case at bar cannot be sustained.

Appellee cites *Ex parte Lung Wing Wun,* 161 F. 211, as support for his contention that the testimony of appellants and their older brother has little weight. In that case, however, it was simply held that the bare testimony of an individual *as to the place of his birth,* being hearsay, "is entitled to little credence,

unless corroborated." In the case at bar the testimony of the appellants as to the relationship is fully corroborated by the uncontradicted testimony of four other close relatives.

Appellee's attempt to attack the grandmother's testimony (brief p. 64) is based upon premises which do not exist. In the first place appellee is in error in stating that "at no time did she testify seeing the first grandson, Fong Din Deck, aka Fong Hung Fong, in China". This statement, and appellee's mention of alleged inconsistencies, reflect an incomplete reading of the transcript. At the very outset, the grandmother gave the following testimony:

> "Q. (by Mr. Hertogs). I will show you Plaintiff's Exhibit number 3 for identification and ask you if you can identify those individuals from left to right, please?
>
> A. The woman sitting in the front is Lim Fong's wife, my daughter-in-law, Jee Shee. Then, from left to right, Fong Ngar Jing, my granddaughter, the daughter of my son, Fong Lim Fong. Fong Hung Wing, also known as Fong Lim, my grandson, the son of Lim Fong. Fong Wone Jing, who is Lim Fong's daughter, and Fong Hung Fong, who is Lim Fong's first son." (T. 27-28).

> "Q. (by Hertogs). Did you make a trip to China in about 1934, '35?
>
> A. In 1935.
>
> Q. You made a trip to China?
>
> A. Yes.
>
> Q. And where did you make this trip? What place?

A. To the village, the Gong Mee Village.

Q. And in what district is the Gong Mee Village located?

A. Toyshan District.

Q. And who was residing in the Gong Mee Village at that time?

A. *When I arrived in China, Fong Lim Fong, his wife, his first son, and his first daughter were residing in the house. About two or three months after my arrival there, his second son was born in the house.*

* * * * * * *

Q. Was your son, Fong Lim Fong, and Jee Shee residing together in the Gong Mee Village as husband and wife at the time of your trip in 1935?

A. Yes, they were husband and wife and they resided there with their children." (T. 28-29).

Consequently the witness had already identified Fong Hung Fong as the first son, had testified that he and the first daughter were living in the family home when the witness arrived in China and had further testified that the second son was born there two or three months after her arrival. Moreover, she identified the photograph (Plaintiffs' Exhibit 5) as having been taken in the Gong Mee Village in 1936 and identified the infant she is carrying in the picture as Fong Hung Wing and the other child as Fong Hung Fong (T. 33-34).

Appellee contends that the grandmother testified that Fong Hung Wing was living with her son when she arrived in China (T. 30). He bases this on the

recorded answer to one question, whereas any fair reading of her testimony as a whole will demonstrate that this was obviously an inadvertent transposition of the name "Fong Hung Wing" for the name "Fong Hung Fong", and that the error may well have been either in the interpreting or in the recording of the answer. These Chinese names are difficult to follow when several rather similar-sounding names are involved in running testimony, and the Court itself at about that point found it necessary to slow down the interrogation to avoid just such confusion (T. 31). Elsewhere the grandmother properly described, named and identified *each* of the children *several times* (T. 28, 31-32, 34, 35) without confusion or error of any kind.

It also appears that there was similar inadvertent transposition of the name "Fong Ngar Jing" for "Fong Hung Wing" in relation to the birth of the second boy (T. 30), since her testimony is clearly to the effect that Fong Ngar Jing is her granddaughter (T. 28, 32) who was born after witness returned to the United States (T. 35).

No notice was taken of these alleged inconsistencies in the Court below, which is a further indication that they were but inadvertent misstatements or misunderstandings either on the part of the witness, the interpreter or the recorder.

Appellee also appears to attach some adverse significance to an alleged change of testimony by appellants' aunt, as follows:

"Q. While you were in China was the third child born?

A. No, he was not born yet.

The Court. After you returned?

The Witness. No—excuse me, he was born while I was there." (T. 76).

We submit that the attempt to attach an adverse implication to this momentary inadvertence of the witness is without substance or merit. Such inadvertent mistakes are to be expected from the most fluent witness.

Appellee also contends that the testimony of the grandmother and the aunt is of little weight because they had not seen any of these appellants since the latter were small children. But the grandmother and the aunt knew that Fong Lim Fong and his wife, Jee Shee, had such children, they had seen the children Fong Wone Jing and Fong Hung Wing, and had been notified of the subsequent birth of the child Fong Ngar Jing. Moreover, they produced a photograph taken by the aunt in China showing the grandmother with the child Fong Hung Wing and his older brother Fong Hung Fong. Fong Hung Fong (whose identity is conceded) is here also, and he has identified the appellants as the brother and sisters who lived with him in China until he came to the United States in 1949. The appellants' testimony is to the same effect. Certainly all this testimony cannot be summarily discarded. Obviously it is sufficient to establish the claimed relationship, under "reasonable judicial stand-

ards" (*Ching Hong Yuk v. United States* (C.A. 9) 23 F.(2d) 174, 175).

We submit that nothing in appellee's brief furnishes any justification for the rejection of the positive, uncontradicted and unimpeached testimony of the seven witnesses on the issue of appellants' relationship to Fong Lim Fong, the citizen father.

CONCLUSION.

It is, of course, unfortunate that some 700 of these cases are pending in the Court below. We think it would be more unfortunate if such recourse had not been open to persons whose claims of citizenship were rejected by consular officers abroad (and who were thus prevented from coming to the United States), without even the procedural safeguards usually attaching to administrative processes, such as a hearing at which the party may have counsel, may introduce witnesses and depositions, is advised of the reasons for an adverse decision, and is afforded an appeal to a reviewing body on the basis of a transcript which is open to his inspection. Absent even these rudimentary safeguards, is it surprising that the rejected applicants invoked the remedy provided by 8 U. S. C. section 903, supra? They had no other recourse.

In any event, we submit that appellee's challenge to the jurisdiction of the trial Court in the case at bar is without merit, that the citizenship of these

appellants was clearly established by the evidence and that the findings of fact are clearly erroneous.

We respectfully submit that the judgment should be reversed.

Dated, San Francisco, California,
November 30, 1953.

Respectfully submitted,
JACKSON & HERTOGS,
JOSEPH S. HERTOGS,
ARTHUR J. PHELAN,
Attorneys for Appellants.